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In The

Supreme Court of the United States

CUBA SOIL AND WATER CONSERVATION DISTRICT and LEA SOIL AND WATER CONSERVATION DISTRICT,

Petitioners,

v.

JAMES LEWIS, TREASURER, STATE OF NEW MEXICO and STATE OF NEW MEXICO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The facts in this appeal are not in dispute. Prior to 1976 amendments to the federal mineral leasing act, Congress granted the states where federal minerals are extracted the right to spend 50 percent of the royalties received by the United States for statewide school and road purposes in their unfettered discretion. In 1976 Congress rejected that formula and going forward required that when spending the federal royalties, the states give "priority" to state government subdivisions impacted by federal mineral development for planning, public services and infrastructure. 30 USC 191.

Before the federal courts below, New Mexico confirmed that out of the $465 million in federal royalties it received from the United States in FY 2006, over 99 percent was spent on state wide schools with nearly all of the monies targeted for Albuquerque. The FY 2006 pattern of spending reflects a consistent and ongoing pattern. The Tenth Circuit found no funds were provided the two Petitioner state subdivisions within whose largely rural boundaries widespread federal oil and gas development occurs.

Does Congress' directive that New Mexico give "priority" (defined in Webster's New World Dictionary, Third College Ed. (1988) as a "right of precedence over others in obtaining . . . something") to impacted state subdivisions establish a right of action for the two Petitioners to have New Mexico establish a

QUESTION PRESENTED – Continued

"priority" distribution plan for those communities which are adversely impacted from federal mineral development, where Congress' scheme provides no express remedy and the impacted subdivisions have to rely on the good faith of the New Mexico legislature to honor Congress' mandate?

LIST OF PARTIES

The Cuba and Lea Soil and Water Conservation Districts are subdivisions of the State of New Mexico, created by New Mexico statute. Within their largely rural boundaries – embracing nearly 4,000,000 acres – significant federal gas and oil is developed, processed and marketed.

Defendant James Lewis is the Treasurer of the State of New Mexico who receives each month payments from the United States Department of Interior representing 50 percent of the United States royalties received that past month from oil and gas operators who develop federal minerals in New Mexico.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners, Cuba and Lea Soil and Water Conservation Districts have no corporate parent and there are no publicly held companies that hold any stock of the petitioners.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	iii
Rule 29.6 Corporate Disclosure Statement	iv
Table of Contents	v
Table of Appendices	vii
Table of Authorities	ix
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	4
Reasons for Granting the Petition	6
A. The Writ raises important Supremacy Clause issues of first impression for the decisions below permit a number of western states to ignore the express condition which Congress imposed in 1976 on the distribution of billions of dollars in federal mineral royalties to the producing states	6
B. The lower courts' stated reluctance to "commandeer the New Mexico legislative process" to enforce the federal royalty distribution plan misreads the Court's long standing Congressional spending power decisions, resulting in the protection of the status quo in New Mexico	10

TABLE OF CONTENTS – Continued

Page

C. Congress' delegation of the power to implement the priority distribution mandate to the New Mexico legislature neither disables federal court oversight nor reduces the availability of an implied right of action 14

i. Because 30 USC 191 relies on the good faith of the New Mexico legislature to implement Congress' priority mandate to protect impacted communities, implying a right of action is particularly appropriate 18

ii. Alleged Tenth Amendment concerns caused the lower courts to miss the rights creating mandate in Congress' 1976 change in how federal royalties are to be distributed 21

iii. Requiring "priority" in the distribution of federal mineral royalties is precisely the type of broad congressional mandate which the Court has relied upon to support its recent right of action cases 25

TABLE OF CONTENTS – Continued

Page

D. Because the Tenth Circuit ruled for the first time on the purpose and scope of both the 1976 "priority" amendments, 30 USC 191, which affect multiple western states and the 1987 "enforcement" amendments, 30 USC 195, which affect hundreds of private mineral operators doing business with the United States, widespread federal property interests deserving careful attention by the Court are implicated in this appeal of first impression 30

Conclusion 35

TABLE OF APPENDICES

Opinion of the United States Court of Appeals for the Tenth Circuit dated May 28, 2008 affirming the decision of the District Court....App. 1

Opinion of the United States District Court for the District of New Mexico, dated August 28, 2007, ruling that the two Districts did not possess an implied right of action to enforce the priority mandate of 30 USC 191 .....App. 10

Order of the United States Court of Appeals for the Tenth Circuit denying Petitioners' request for a rehearing and a rehearing en banc, dated July 15, 2008 .....App. 20

Treasurer Lewis *Answer Brief*, p. 25 .....App. 22

TABLE OF CONTENTS – Continued

Page

Excerpts from Brief of the United States urging the United States Supreme Court to note probable jurisdiction in *Lawrence County v. Deadwood School District*, 469 US 256 (1984).....App. 24

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. Sandoval, 532 U.S. 275 (2001) 15

Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006).....11, 13

Blessing v. Freestone, 520 U.S. 329 (U.S.1997) ...27, 28

Cannon v. U. of Chicago, 441 U.S. 677 (1978)31, 32, 33

CBOCS West Inc. v. Humphries, 2008 WL 2167860 (May 27, 2008).....26

Garber v. Lago Vista Independent School District, 524 U.S. 274 (1998) 17

Gomez-Perez v. Potter, 2008 WL 2167189 (May 27, 2008) 26

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).....26, 27, 28, 29

Jackson v. Birmingham Bd., 544 U.S. 167 (2005).....26

Karahalios v. National Federation of Federal Employees, Local 1263, 489 U.S. 527 (1989).....20

Lawrence County v. Deadwood School District, 469 U.S. 256 (1984).....*passim*

New York v. United States, 505 U.S. 144 (1992)...11, 29

Northwest Airlines Inc. v. Transport Workers, 451 U.S. 77 (1980).....18, 19, 31

Pope v. FCC, 311 F.3d 1379 (Fed. Cir. 2002).....12

Rosado v. Wyman, 397 U.S. 397 (1970) 31

TABLE OF AUTHORITIES – Continued

Page

South Dakota v. Dole, 483 U.S. 203 (1987)..... 11

Universities Research Assn. v. Coutu, 450 U.S. 754 (1980)..... 19

Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987)..... 15, 16

STATUTES:

Federal:

30 USC 191..... *passim*

30 USC 195..... *passim*

State:

Section 22-8-34 New Mexico Statutes Annotated..... 3, 8

Section 73-20-26 New Mexico Statutes Annotated..... 4

PETITION

The Cuba and Lea Soil and Water Conservation Districts respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of New Mexico is reproduced at appendix 10. The reported opinion of the United States Court of Appeals for the Tenth Circuit is reported at appendix 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1). The Tenth Circuit decision was entered May 30, 2008 and Petitioners' petition for rehearing and rehearing en banc was denied on July 15, 2008. This Petition is filed within 90 days of that last date.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. VI, Cl. 2 (Supremacy Clause).

1976 amendment to Mineral Leasing Act, 30 USC 191:

In relevant part, this federal statute states that the United States is to return 50 percent of federal mineral royalties generated from the lease of public lands –

To the State . . . within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any such State . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter for (i) planning, (ii) construction and maintenance of public facilities and (iii) provision of public services.

1987 amendment to the Mineral Leasing Act, 30 USC 195 entitled Enforcement defines violations as follows:

> *(a) Violations* It shall be unlawful for any person:
>
> (1) to organize or participate in any scheme, arrangement, plan or agreement to circumvent or defeat the provisions of this Act or its implementing violations, or
>
> (2) to seek to obtain or to obtain any money or property by means of false statements of

material facts or by failing to state material facts concerning:

> (A) the value of any lease or portion thereof issued or to be issued under this Act;
>
> (B) the availability of any land for leasing under this Act;
>
> (C) the ability of any person to obtain leases under this Act; or
>
> (D) the provisions of this Act and its implementing provisions.

(f) *State Civil Actions* A State may commence a civil action under subsection (c) of this section against any person conducting activity within the State in violation of this section. . . . Any civil penalties recovered by a State under this subsection shall be retained by the State and may be expended in such manner and for such purposes as the State deems appropriate.

Section 22-8-34 New Mexico Statutes Annotated (Federal Mineral Leasing Fund) provides:

> A. Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining technology. . . . all other money received by the state pursuant to the provisions of the federal Mineral Lands Leasing Act, 30 USC 191 et seq. shall be distributed to the public school fund.

Section 73-20-26 New Mexico Statutes Annotated defines the powers of Soil and Water Conservation Districts:

> [t]hey are to control and prevent soil erosion; prevent flood water and sediment damage; further the beneficial application of water; promote the use of impounded water for recreation fisheries, irrigation, urban and industrial needs; and by pursuing these goals to conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico.

STATEMENT OF THE CASE

In December of 2006, Cuba Soil and Water Conservation District filed an *Ex Parte Young* action against Mr. James Lewis, New Mexico state treasurer, in the United States District Court for the District of New Mexico seeking a declaration and an injunction against the future distribution of federal royalties funds by the New Mexico Treasurer into the New Mexico state wide school fund. In January of 2007, Lea Soil and Water Conservation District joined in the filing of a first amended complaint. *See* first

amended complaint. Aplt. App., pp.8-17.[1] The Districts, governmental subdivisions created by the New Mexico Legislature with the authority to protect lands, waters, and the health and welfare of thousands of largely rural New Mexico residents residing within boundaries covering million of acres, seek to enforce 30 USC 191. That statute, as amended in 1976, directs that ever increasing federal royalties returned to the states where federal mineral development takes place no longer be used solely for statewide schools and roads, but rather that "priority" in the distribution of the federal royalties be given to governmental subdivisions impacted by federal mineral development, to be used to fund public planning, infrastructure and services.

On February 7, 2007, Mr. Lewis filed a motion to dismiss under Rule 12, FRCP, contending that the Districts lacked standing, that their claims were barred by the Eleventh Amendment and that they did not possess an implied right of action. The issues were briefed by both parties. On March 12, 2007, the Districts filed a motion for a preliminary injunction seeking to have approximately 15% of the monthly payment made to the New Mexico treasurer from the United States Department of Interior placed in the federal court registry during the pendency of the proceedings. The Districts requested that the funds

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[1] References to Aplt. App. are to the Petitioners' Appendix filed with the Tenth Circuit and Supp. App. are to Mr. Lewis' Appendix filed with the Tenth Circuit.

be distributed once the New Mexico Legislature adopted a distribution plan which the federal courts found to comply with the "priority" mandate of 30 USC 191.

On August 28, 2007 the District Court entered a decision dismissing the complaint of the Districts on the sole basis that no implied right of action existed. A timely notice of appeal was filed on September 5, 2007. On May 30, 2008, the Court of Appeals entered an opinion which it stated was one of first impression, to be published, upholding the decision of the District Court. On June 28, 2008, the Districts filed a petition for rehearing and a petition for rehearing en banc. The motions were denied on July 15, 2008. This Petition is timely filed on October 13, 2008.

REASONS FOR GRANTING THE PETITION

A. The Writ raises important Supremacy Clause issues of first impression for the decisions below permit a number of western states to ignore the express condition which Congress imposed in 1976 on the distribution of billions of dollars in federal mineral royalties to the producing states.

When determining whether to grant certiorari in *Lawrence County v. Deadwood School District*, 469 U.S. 256, 264 (1984), the Court sought the advice of the United States as to whether the Court should review South Dakota's redirection of federal payments

in lieu of taxes away from the recipients established by Congress. In that case the South Dakota legislature established a plan of distribution which redirected how federal funds were to be spent, in violation of Congress' directions.[2] The United States urged the Court to take and reverse the lower court decision, stating:

> This case is of considerable practical importance. If the decision of the South Dakota Supreme Court is allowed to stand, South Dakota counties will be required to allocate federal in lieu of taxes payments in a manner they probably would not otherwise choose. As a result, certain local programs will not receive the full amount of financial support the local government regards as proper. As a result, the scope of such programs will be curtailed, perhaps reducing the level of essential services the local governments are able to offer in connection with federal lands. Moreover, if not reversed by this Court, the decision below may encourage other states to enact legislation similar to the South Dakota statute – or even more intrusive. . . . [i]f *the South Dakota statute*

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[2] *Lawrence County* referenced payments in lieu of taxes for the entire country at a level of $100 million. In this appeal, the online data shows New Mexico receiving in FY 2005 alone $444 million in federal royalties, in FY 2006 $573 million in federal royalties, and the City of Albuquerque alone obtaining in 2005 $490 million in school equalization funds – nearly all of which are funded from federal royalties. Aplt. App. 68 and 73.

> *survives judicial review, other states (many of which are facing budgetary difficulties) can be expected to use it as a model in their efforts to gain greater control of available revenues. The result will be to undermine further the congressional purpose underlying the Payments in Lieu of Taxes Act.*[3] (emphasis supplied).

The Court granted certiorari, found that the South Dakota statute – redirecting federal funds away from the objectives specifically identified by Congress "obstructs this congressional purpose and runs afoul of the Supremacy Clause." *Lawrence County* at 270. If not distinguished or reversed by the Court, New Mexico's deliberate and to date successful effort to utilize state law to rewrite the unambiguous mandate of Congress placed in 30 USC 191 will result in an elimination of the holding in *Lawrence County* from the Court's Supremacy Clause case law.

New Mexico concedes that virtually all of the federal royalties it receives[4] goes to support public schools, primarily in its largest city, Albuquerque. But

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[3] Excerpt from the Amicus Brief of the United States; appendix 24.

[4] Except for placing federal royalties in the public school fund – in direct contradiction of Congress' mandate to give "priority" to impacted subdivisions, New Mexico provides a small fraction of the hundreds of millions it receives in federal royalties for the New Mexico Institute of Mining and Technology. Section 22-8-34(a) NMSA. And for FY 2006, that allocation amounted to $100,000. Aplt. App. 72.

that distribution plan is exactly the formulation which Congress threw out in 1976. See 30 USC 191 as amended and H. Rept. 94-681 (Nov. 21, 1975), discussed at p.21 *infra*. Given the State's persistent and willful refusal to distribute federal royalties as Congress directed, the rural communities where ever larger federal oil and gas development is expanding are hurting.

Before the trial court, the Districts submitted detailed affidavits demonstrating pervasive and long standing soil and groundwater contamination from mineral development; resulting poverty and neglect of basic medical and social services and infrastructure; and a lack of public medical, educational, and community facilities such as are commonly found in the urban areas of New Mexico. Accordingly, how federal royalties are spent in New Mexico is not an academic matter. Communities and families are suffering while Congress' careful and deliberate plan to provide assistance has been systematically undermined.

The Districts informed the lower courts that they had been unable to have the few elected officials from their geographically large but population limited oil and gas basins bring about a change in the State's distribution plan. Overcoming the preference of a strong majority of New Mexico's urban and suburban legislators to preserve the status quo is not achievable. Nevertheless, the Tenth Circuit concluded: "At this point, Plaintiffs' remedy lies in the political

process rather than in the judicial arena," appendix p.9.

The Districts request the Court to grant its petition and review this case for (a) the Tenth Circuit published opinion eliminates any incentive in New Mexico and elsewhere to comply with Congress' mandatory directive; (b) with federal mineral royalties now generating billions of dollars in royalties, the Court should address New Mexico's abuses now rather than later; and (c) the published opinion of first impression (as described by the Tenth Circuit) rewrites Spending Clause case law and misapplies the Court's implied right of action standards.

B. The lower courts' stated reluctance to "commandeer the New Mexico legislative process" to enforce the federal royalty distribution plan misreads the Court's long standing Congressional spending power decisions, resulting in the protection of the status quo in New Mexico.

The Tenth Circuit directed the Districts back to the New Mexico Legislature in part because they found the request of the two State subdivisions for judicial enforcement of 30 USC 191's "priority" to "represent an unwarranted intrusion upon State sovereignty in tension with the Tenth Amendment." and then separately to "strain judicial competence" appendix pp.7-8. We address the Tenth Amendment issue here and will address the implied right of action issue in **Part C**, *infra*.

In setting forth its concern about the scope of federal court power, the Tenth Circuit cited *New York v. United States*, 505 U.S. 144 (1992). But *New York* makes it clear that while Congress may not "require the states to govern according to Congress' instructions," *Id.* at 162, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." .... and "the conditions attached to the funds by Congress may influence a State's legislative choices." *Id.* at 167. *New York* in turn cited *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) where the Court – in yet another case involving a federal statute which attached conditions that could only be met by a state legislature – confirmed that no constitutional flaw existed in a statute directing the Secretary of Transportation to withhold federal highway funds from States failing to adopt Congress' choice of a minimum drinking age.

Just two years ago, the Court in *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-298 (2006) confirmed that while Congress has broad power to set the terms on which it disburses federal money to the States, when it does so, such conditions must be set out "unambiguously." "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly." 548 U.S. at 296.

Arlington Cent. School first looked to the text of the statute before it: "In considering whether the

IDEA provides clear notice, we begin with the text. We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'". . . . When the statutory "language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Id.* at 296.

The dictionary definition of priority is a "right of precedence over others in obtaining. . . . something." Webster's New World Dictionary, Third College Ed. (1988), p.1071. The Federal Circuit recently followed the dictionary, concluding that "priority" in a federal employment law means that a priority candidate is to be given "consideration" **before** any other candidate and such candidate is not to be compared with non priority candidates. *Pope v. FCC*, 311 F.3d 1379, 1381 (Fed. Cir. 2002). Moreover Congress' 1976 requirements for the distribution of federal mineral royalties are systematically more strict than those examined by the Court in *Lawrence County*. Congress in 30 USC 191 set forth specific limitations for how the "priority" payments should be spent. Only "mineral impacted" subdivisions were to receive priority and then the funds could only be used for "planning, infrastructure or public services." *Id.* In contrast, the distribution plan in *Lawrence County* provided that all "general purpose political subdivisions" could receive the payments in lieu of taxes and then could use the federal funds "for any governmental purpose." 30 USC 6902(a).

Under the standards set forth in *Arlington Cent. School* New Mexico without question accepts each month millions of federal royalty dollars "knowingly and voluntarily" understanding that the first dollars are to be targeted for public services for impacted local communities.[5] Given this unambiguous contract, *Arlington Cent. School* authorizes the federal courts to intervene to protect the federal resources. Given the Court's recent directive in *Arlington Cent. School,* "to enforce it[the words]according to its terms," the Petitioners request that the Court grant the writ and examine in detail Congress' 1976 amendment changing the allocation of hundreds of millions of dollars in federal royalties from use solely for statewide schools and roads to a plan which includes such matters, but only after "priority" has been given to providing infrastructure and public services to state subdivisions impacted by federal mineral development. These instructions are unambiguous, address matters of national interest, and states should not be permitted to abuse the receipt of ever increasing federal royalties.

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[5] The 1976 amendment not only put New Mexico on notice about the "priority" requirement, but it also elevated in the first instance state subdivisions as equal recipients of federal royalties with the State. That is, before 1976 the State possessed unfettered discretion in how it would use the funds. After 1976, Congress directed that the royalties are "to be used by such State *and* its subdivisions. . . ." (emphasis supplied).

C. Congress' delegation of the power to implement the priority distribution mandate to the New Mexico legislature neither disables federal court oversight nor reduces the availability of an implied right of action.

At the heart of the lower courts' error, is their reluctance to enforce traditional Spending Power protections where the State legislature is implicated in identifying what local political subdivisions are impacted and what public needs are in need of priority assistance. That reluctance explains why the Tenth Circuit, as noted above, pp.9-10, informed the Petitioners that the only remedy for the undisputed beneficiaries of 30 USC 191 is to bring their needs to the New Mexico Legislature. This unwillingness of the lower courts to utilize the long standing powers of the federal courts to enforce an unambiguous congressional spending directive – if not limited – has the potential to encourage states, in difficult economic times, to take all forms of federal funds and use them as they see fit. Petitioners believe this is precisely the type of errant lower court rulings which justify review by the Court.

The lower courts, with virtually no discussion and lacking any citation, found that Congress' mandate of "priority" failed to provide "manageable substantive standards" and accordingly "would strain judicial competence," appendix p.7. On this basis the Tenth Circuit declined to find that Congress intended adversely impacted communities to have the ability

to force some form of "priority" distribution. The notion that Congress has failed to set forth the required "rights creating language"[6] to support a right of action such that judicial competence would be impermissibly "strained" in an effort to enforce ambiguous federal rights formed one reason for the dissent in *Wright v. City of Roanoke Redevelopment and Housing Authority,* 479 U.S. 418 (1987). That case found that the Brooke Amendment to the Public Housing Act of 1937, Pub.L. 91-152, § 213, 83 Stat. 389 (1969) and its regulations created in eligible public housing residents the right to enforce under 42 USC 1983 the cost of "reasonable utilities" to be included in the statutory limited "rent" which they may be charged by a public housing authority (PHA).

Writing in dissent, Justice O'Connor found that given the statute's lack of "rights creating words" and the constantly changing regulatory schedules for allowing utility costs to be included in the ceiling on rent, there existed a structural difficulty in how federal court relief could be formulated.

> Even assuming that agency regulations of the sort at issue here could create rights enforceable in a § 1983 action, the temporary regulations involved in this case are not capable of judicial enforcement. *The provisions remained subject to the exercise of wide discretion by the local housing authorities, thereby rendering it difficult or impossible to*

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[6] See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

> *determine whether a violation occurred. . . .* The housing authorities were to revise their utility allowances if more than 25% of the tenants in a particular dwelling unit category were being surcharged, if there was "no reason of a non-recurring nature (such as weather extremes) to account for this" and if it was otherwise "appropriate." § 865.480(b). *Provisions such as these, which provide no basis for calculating an individual tenant's utility allowance or for providing a remedy if there is a violation, simply defy judicial enforcement. Id.* at 438-439 (emphasis supplied).

Because the source of the utility right in *City of Roanoke* was established in ever changing regulatory formulations, the dissent, but not the Court, found that enforcing appropriate utility payments for a large number of public housing tenants as an element of rent was simply too fact specific to each public housing project to permit the establishment of specific and quantifiable requirements. And without such firm requirements, the dissent found it inappropriate to find an implied right of action.

Without analysis or citation, the lower courts concluded that seeking federal oversight over the establishment of a coherent mechanism for assuring "priority" in distributions to adversely affected New Mexico communities was beyond the power of the federal courts. If this finding is based on a lack of specificity in the word "priority," the lower courts are wrong. If this conclusion is based on a concern that

the Petitioners are seeking a determination of present and future funds for their mitigation, the lower courts miscomprehend the focus of the relief sought. The Tenth Circuit, appendix p.7, justified its decision in part because of what it saw as the difficulty in calculating what amount of federal royalties should be made available to the Petitioners. But the Petitioners have always sought relief in the form of new legislation which would establish a coherent approach allowing the State and **all** of its subdivisions impacted by federal mineral development to identify priority impacts and disperse a portion of the State's monthly receipt of federal royalties to target those impacts. Asking the federal courts to assure that New Mexico adopt an appropriate "priority" identification and distribution legislative plan fits within the broad contours of the remedy which may be obtained in an implied right of action. As the Court noted: such relief may embrace "all appropriate relief. . . . [so long as it is] reconciled with Congressional purpose. . . . [Courts] have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Garber v. Lago Vista Independent School District*, 524 U.S. 274, 284, 285 (1998).

All the Petitioners seek is that the New Mexico legislature put in place a coherent and transparent procedure for identifying subdivisions impacted by federal mineral development and allocating an appropriate portion of the federal royalties to that "priority" before using the remaining funds for State wide purposes. That is, the Petitioners do not seek to

have the federal judiciary oversee each and every royalty distribution. Rather, they seek from the federal courts a single review of newly enacted State legislation to assure that "priority" is appropriately secured.[7]

i. Because 30 USC 191 relies on the good faith of the New Mexico legislature to implement Congress' priority mandate to protect impacted communities, implying a right of action is particularly appropriate.

Petitioners next set forth what they believe to be the proper implied right of action analysis. First, New Mexico agrees with the Petitioners that Congress' reports and hearings[8] understood that significant enforcement gaps existed in the 1976 amendments. The relevance of legislative history in the implied right of action analysis is limited. *Northwest Airlines*

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[7] As secondary relief, the Petitioners do request damages from the time of the filing of the lawsuit until the implementation of newly enacted legislation. Such damages would presumably take into account evidence of the needs of communities located with Petitioners' boundaries impacted by mineral development. Petitioners believe such request is within the everyday duties of the federal courts. And if not, that secondary claim can be severed or dismissed.

[8] Senate Interior Committee Hearings, May 7 and 8, 1975 (Aplt. App. at 85); House Report No. 94-681, Nov. 21, 1975 (Aplt. App. at 92); House and Senate Floor Statements (Aplt. App. at 184-187); and oversight hearings, August 11, 1981 (Aplt. App. 102, 1060).

Inc. v. Transport. Workers, 451 U.S. 77, 94 (1980) (legislative silence as to a right of action typically results in legislative history silence as well); *Universities Research Assn. v. Coutu*, 450 U.S. 754, 777 (1980) (typically the legislative history inquiry is limited to determining whether any portion of Congress' analysis suggests that an implied right of action would be inconsistent with Congress' goals.). What is important about the legislative history in this appeal is that before the lower courts both the Petitioners and New Mexico agreed that the legislative history of the "priority" mandate show Congress was aware that the "priority" change would likely create "tensions" between the state priorities and the impacted community priorities. Also both advised the courts that Congress was specifically informed that no enforcement mechanism existed to assure "priority" distributions. Treasurer Lewis *Answer Brief*, pp.24-25. Yet Congress did not address either concern.

When deciding that the Civil Service Reform Act of 1978 did not create an implied right action for federal employees whereas the National Labor Relations Act did, the Court focused on the structure of the rights creating provisions:

> In the first place, Title VII [of the Civil Service Reform Act] is not a carbon copy of the NLRA [National Labor Relations Act], nor is the authority of the FLRA [Federal Labor Relations Authority] the same as that of the NLRB. The NLRA, like the RLA, did not expressly make a breach of the duty of fair

> representation an unfair labor practice and did not expressly provide for the enforcement of such a duty by the NLRB. *That duty was implied by the Court because members of bargaining units were forced to accept unions as their exclusive bargaining agents.*
>
> *Karahalios v. National Federation of Federal Employees, Local 1263* 489 U.S. 527, 534-535 (1989) (emphasis supplied).

In like fashion, Petitioners have been "forced" to accept New Mexico as their "exclusive bargaining agents" in assuring that impacted subdivisions throughout New Mexico – and not just the Petitioners and their communities – are afforded "priority." Providing an implied right of action is particularly appropriate given the obvious inability of the Petitioners and their rural constituents to influence the urban dominated legislature. That is the teaching of *Karahalios* and other cases of the Court. The lower courts never analyzed the manner in which the role of the legislature enhanced a finding of an implied right of action. Rather, as shown above, they saw Congress' delegation of authority to the legislature to identify impacted communities and establish appropriate mitigation measures as removing federal court involvement. In a word, the lower courts in a matter of first impression affecting billions of federal dollars each year failed to make the correct analysis.

ii. Alleged Tenth Amendment concerns caused the lower courts to miss the rights creating mandate in Congress' 1976 change in how federal royalties are to be distributed.

In 1976 Congress deliberately took away the prior discretion granted to western states. Before 1976, federal mineral funds were to be used for public roads and schools, as the legislature of the State may direct. 41 Stat. 450. In 1976, at the urging of Rocky Mountain rural communities then impacted by a much smaller energy boom, Congress amended the law to read:

> To be used by such state and its subdivisions as the legislature of the state may direct **giving priority** to those subdivisions of the state socially or economically impacted by development of minerals leased under this chapter for (i) planning (ii) construction and maintenance of public facilities and (iii) provision of public service. 30 USC 191[9] (emphasis supplied).

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[9] As noted in footnote 5, *supra*. The 1976 amendment not only put New Mexico on notice about the "priority" requirement, but it also elevated in the first instance state subdivisions as equal recipients of federal royalties to the State itself. That is, before 1976 the State possessed unfettered discretion in how it would use the funds. After 1976, Congress directed that the royalties are "to be used by such State *and* its subdivisions. . . ." (emphasis supplied).

The major structural change in 30 USC 191 followed from congressional hearings and deliberation. The Senate Interior Committee Hearings of May 7 and 8, 1975 stated:

> Anyway, we are in agreement that **primarily** this money should be spent for these local impacts in addition to schools and roads rather than for just general governmental purposes in the state. Alt App at 85[10] (emphasis supplied).

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[10] The Court's analysis in *Lawrence County* – relating to payments in lieu of taxes – relied on virtually identical Congressional concerns from 1976 as to how payments in lieu of taxes and federal mineral royalties could be distributed to better target local communities impacted by federal land ownership on one hand and federal mineral development on the other hand:

> Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parceled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt.

S.Rep. No. 94-1262, p.9 (1976), U.S.Code Cong. & Admin.News 1976, *Lawrence County* at 263. The Senate Report later stated:

> . . . [T]oo many of the [existing] revenue sharing provisions restrict the use of funds to only a few governmental services – most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. . . . It is only the most

(Continued on following page)

House Report No. 94-681, Nov. 21, 1975 was in full agreement:

> Since Section 35 of the Mineral Leasing Act of 1920 currently provides that the moneys returned to the States be available only for schools and roads, it is difficult for affected areas to meet the needs of their new inhabitants. This situation exists both with respect to coal and geothermal development, as well as other mineral resources . . . **An effort must be made to alleviate these problems by making funds available for the various aspects of community development.** Alpt. App. at 92 (emphasis supplied).

Notwithstanding Congress' decision to require "priority" to impacted rural communities – [to give "precedence" to mitigate their social, environmental and economic impacts – that is, to assure that the funds are spent **primarily** for such purposes, p.22 *supra*] – New Mexico concedes that it targets **no** federal funds specifically for impacted communities.

Only public schools obtain the royalties, and as shown before, virtually all of the funds go to Albuquerque. What the Court observed in *Lawrence*

> fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

Report at p.9, *Lawrence County* at 264.

County about public schools highlights the seriousness of New Mexico's manipulation of federal royalties here.

> The picture that emerges from the hearings on the Act is that there are many counties in which much of the land is owned by the Federal Government, and whose populations are markedly increased by tourists and hunters in the summer, in deer season, or on the weekends. These transients suffer accidents requiring emergency services or hospitalization for which they cannot always pay; commit crimes that call for police protection, prosecution, and incarceration; create waste that necessitates the construction of sewage treatment plants; use roads that must be paved and maintained; and generally impose a strain on a county's limited resources without providing much in the way of compensating revenues. *One cost unlikely to increase with the presence of this largely uninhabited federal land, however, is that of education.* *Lawrence County* at 255-256 (emphasis supplied) (footnotes omitted).

In other words Congress both in the payments in lieu of taxes and in the distribution of royalties expressly decided to leave public school funding as a state responsibility. This specific and unambiguous plan – corrected by the Court in *Lawrence County* – is systematically ignored three decades later in New Mexico.

In 1976 Congress made a decisive change in the way in which federal royalties were to be distributed. Given the summary analyses of the lower courts – which resulted in the preservation of the status quo in New Mexico – Congress' mandate may well be ignored throughout the West. Each of the states is now free to use its federal mineral royalty payments received each month for State wide purposes. The lower courts have effectively eliminated the 1976 amendments.

iii. Requiring "priority" in the distribution of federal mineral royalties is precisely the type of broad congressional mandate which the Court has relied upon to support its recent right of action cases.

The Tenth Circuit's erroneous focus on Tenth Amendment concerns led it to miscomprehend this Court's implied right of action rulings. Petitioners assert that 30 USC 191 indeed establishes the required "rights creating" protection – the first step in determining whether a right of action may be implied. Many implied right of action cases have emerged from a congressional demand that racial minorities and women are assured equal opportunity or freedom from discrimination. "Discrimination" is defined as "prejudice in treatment." Webster's New World Dictionary, Third College Ed. (1988), p.392. As noted above, priority is defined as "a right to precedence over others in obtaining, buying or doing something."

Webster's New World Dictionary, Third College Ed. (1988), p.1071. A plain reading of these definitions supports the conclusion that a "right to precedence over others" is at least as specific a benefit if not more precise a benefit than is the right to be free of "prejudice in treatment."

Jackson v. Birmingham Bd., 544 U.S. 167 (2005) held that 20 USC 1681 (Title IX) which states "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal funds. . . ." creates an implied right of action for a person whose school job was downgraded when he complained about financial discrimination against the women's basketball team he was coaching. *Jackson* confirmed that where Congress uses "broad" language protecting a class rather than a list of prohibited acts targeting the recipient of federal funds, an implied right of action is more likely to be found. 544 U.S. at 175. *Jackson v. Birmingham Bd.*, at 174, was recently relied upon in *Gomez-Perez v. Potter*, 2008 WL 2167189 (May 27, 2008) to support a right of action for targeted beneficiaries who alleged "differential treatment" in the face of a non-discrimination mandate to protect employee applicants who are at least 40 years of age. The same conclusion was found in *CBOCS West Inc. v. Humphries*, 2008 WL 2167860 (May 27, 2008) on behalf of a party who complained that another person's contract-related rights under 42 USC 1981(a) ("[a]ll persons within the jurisdiction of

the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens,") had been violated.

Permitting a right of action to enforce a broad congressional requirement of "priority" is distinguishable from the Court's analysis of cases where either Congress proscribed certain behavior, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) or where an examination of Congress' direction revealed that it was not setting forth mandatory conditions, but rather simply its preference. That the presence of a broad right to "priority" for the benefit of Petitioner state subdivisions provides an enforceable right of action follows from a second line of cases of the Court – namely cases where individuals pursue 42 USC 1983 claims. *Blessing v. Freestone,* 520 U.S. 329, 341-343 (1997) emphasizes that "a specific right" must be identified as a first step in identifying an implied right of action. In *Blessing*, the Court found that Congress' requirement that a state bring its child support program into substantial compliance with federal law established standards for state administration but did not provide specific and mandatory benefits for individual children or custodian parents. Further, this Court held that the detailed requirements imposed by Congress on the administering state's data processing system are designed to "improve the overall efficiency of the State's child support enforcement scheme" not establish "individual rights to computer services." *Id.* at 344-345. *Blessing* further emphasized that the federal spending condition

imposed on the state be binding and mandatory. *Id.* at 340-341.[11] Because the 1976 amendments to the mineral leasing act do not focus on standards for state or private administration of federal dollars, but rather inserted for the first time a "binding and mandatory" right to "priority" for federal mineral impacted subdivisions, the Court's past rulings strongly support review of the lower courts' rulings.

Here, the Petitioners have alleged and New Mexico has conceded that in the face of a "priority" distribution mandate, they have received no benefit. To the contrary at least 99 percent of the royalties go to the public schools and then most to the City of Albuquerque. The lower courts declined to address why "differential treatment" has repeatedly given rise to an implied right of action, while a "right of precedence" would not. As a result, the New Mexico legislature's manipulation of where federal royalties should be spent – rejected in *Lawrence County* – continues unabated in New Mexico and may well be expanded by urban dominated legislatures throughout the Rocky Mountain West. The lower courts' summary decisions – with limited analysis – do not stand on firm ground. As noted earlier, p.11, the decision

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[11] While *Blessing* involved the assertion of individual rights under 42 USC 1983, *Gonzaga University v. Doe*, *supra* confirms that the implied right of action analysis here is not separate and distinct from the section 1983 cases, explaining that both inquiries "overlap in one meaningful respect": "in either case [a court] must first determine whether Congress intended to create a federal right." *Gonzaga* at 283.

misstates *New York v. United States*, 505 U.S. 144 (1992) and the long standing rules of Congress' Spending Powers. Then, the Tenth Circuit, appendix p.7 relies upon *Gonzaga Univ. v. Doe, supra* to show that "priority" or a "right of precedence over others" does not establish specific rights creating language required for an implied right of action. But *Doe* examined a statute with **no identified beneficiary** – rather the statute was a mere proscription against universities receiving federal funds which read: "No funds shall be made available under any applicable program to any educational agency . . . which has a policy . . . of permitting the release of education records. . . ." 20 USC 1232g(b)(1).

The lack of care found in this published opinion of first impression affecting multiple states and ever growing federal royalties stands as an independent reason for review by the Court. And as we next show, both lower courts completely mishandled the critical question of whether the 1987 amendments to the Mineral Leasing Act established an effective remedy available to the Petitioners to secure "priority" as mandated by Congress.

D. Because the Tenth Circuit ruled for the first time on the purpose and scope of both the 1976 "priority" amendments, 30 USC 191, which affect multiple western states and the 1987 "enforcement" amendments, 30 USC 195, which affect hundreds of private mineral operators doing business with the United States, widespread federal property interests deserving careful attention by the Court are implicated in this appeal of first impression.

This petition not only raises for the first time the scope and enforceability of Congress' 1976 amendment to Mineral Leasing Act. It also places front and center a second question of first impression – namely did Congress ***sub silentio*** adopt 1987 mineral leasing act enforcement amendments to address not only private entity manipulation of royalty payments but also State legislature manipulation of royalty distributions. As next shown, the lower courts failed to answer a required inquiry in all implied right of action cases – namely does there exist an enforcement scheme which the aggrieved litigants can access rather than seek an implied right of action. As the Court has repeatedly stated:

> True this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available. . . . *But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to*

> *activate and participate in the administrative process contemplated by the statute.*

Cannon v. U. of Chicago, 441 U.S. 677, 706, n. 41 (1978) (emphasis supplied).

The Court has consistently examined the availability of administrative or judicial enforcement mechanisms when construing whether rights enforcing language should be found to give rise to an implied right of action. At times it has been willing to recognize a right of action in the presence of a remedial scheme.

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.

Rosado v. Wyman, 397 U.S. 397, 420-421 (1970). But more frequently, the Court has found the presence of a remedial scheme to foreclose implied remedies. *Northwest Airlines Inc. v. Transport Workers,* 451 U.S. 77, 93 (1980).

The Petitioners explained to the lower courts that Congress' amendment in 1987 to the mineral

leasing act set up enforcement powers in the United States and the States **directed against private parties** who alone or in concert might undertake to underpay royalties or otherwise abuse the mineral leasing system. Accordingly nothing in that amendment on its face provides the Petitioners with the "ability to activate and participate," as required by the Court in its quote above from *Cannon*, in a process to assure "priority" of distribution by the state legislature.

The 1987 amendment to the mineral leasing act, 30 USC 195 entitled Enforcement, defines violations as follows:

> (a) *Violations* It shall be unlawful for any person:
>
> (1) to organize or participate in any scheme, arrangement, plan or agreement to circumvent or defeat the provisions of this Act or its implementing violations, or
>
> (2) to seek to obtain or to obtain any money or property by means of false statements of material facts or by failing to state material facts concerning:
>
> (A) the value of any lease or portion thereof issued or to be issued under this Act;
>
> (B) the availability of any land for leasing under this Act;

> (C) the ability of any person to obtain leases under this Act; or
>
> (D) the provisions of this Act and its implementing provisions.
>
> (f) *State Civil Actions* A State may commence a civil action under subsection (c) of this section against any person conducting activity within the State in violation of this section. . . . Any civil penalties recovered by a State under this subsection shall be retained by the State and may be expended in such manner and for such purposes as the State deems appropriate.

Subsections (a) and (f) when read together confirm that Congress was targeting private not governmental action which might fraudulently reduce monies owed the United States and that one method of enforcement was for the States, stepping into the shoes of the United States, to seek civil penalties. That is why Congress used "person" in the same sentence with a "State." Notwithstanding the clear focus of this 1987 amendment to target private manipulation, the Tenth Circuit held that this amendment satisfied the enforcement requirement quoted above from *Cannon v. U. of Chicago* in the context of the Petitioners' attempt to enforce "priority" distribution by New Mexico under 30 USC 191. The Tenth Circuit stated:

> That Congress enacted a scheme, namely sec. 195, to remedy FMLA violations reinforces our conclusion that Congress did not

> intend to create the cause of action Plaintiffs assert. Appendix p.8.[12]

30 USC 195(f) on its face authorizes in a single sentence a "State" to enforce royalty payment violations by a "person" involved in federal mineral leasing. "State" and a "person" cannot be interchanged. There is no way a State – or the United States, see 30 USC 195(c) – can enforce the "priority" mandate of 30 USC 191 by obtaining civil penalties against the New Mexico Treasurer through designating the Treasurer as a "person" attempting to underpay royalty or otherwise abuse the mineral leasing act under 30 USC 195. Very simply the words selected by Congress do not permit such a reading.

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[12] Importantly **both** the federal district court and New Mexico agree with Petitioners that 30 USC 195 is not available to enforce the mandate of 30 USC 191. The district court stated with regard to 30 USC 195: "Conspicuously absent is any mention of a civil action by state subdivisions or any other citizen against a State in order to enforce the 'priority' distribution of mineral royalties under Section 191" App. 17. And the State told the Tenth Circuit:

> Not only did Congress not provide any private right of action or remedy when it expanded the scope of uses for section 191 funds but most importantly recognized the possibility of disputes between subdivisions and States concerning such funds and the lack of any related enforcement rights for subdivisions or citizens yet to this day has not provided for any right of action or remedy.

App. 22.

In addition, the lower courts' overlapping of § 195 enforcement with § 191's priority mandate makes no practical sense, for if § 195 were available to enforce the "priority" requirement of § 191, a New Mexico law enforcement official could impose civil sanctions on the New Mexico Treasurer. Then the State law enforcement official could use the royalties restricted under § 191 for priority impact mitigation and spend them "in such manner and for such purposes as the State deems appropriate." *See* § 195(f). Unfortunately, this twisting and turning of the 1976 and 1987 amendments to the Mineral Leasing Act is where the law now stands not only throughout the Tenth Circuit, but throughout the United States, for the Tenth Circuit has elected to publish what it announced is an opinion of first impression.

CONCLUSION

For each of these reasons, the Districts request the Court to grant their Petition.

October 13, 2008

Respectfully submitted,

DANIEL H. ISRAEL
Attorney for Petitioners

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CUBA SOIL AND WATER CONSERVATION DISTRICT; LEA SOIL AND WATER CONSERVATION DISTRICT,

Plaintiffs-Appellants,

v.

JAMES LEWIS, New Mexico State Treasurer; STATE OF NEW MEXICO,

Defendants-Appellees.

No. 07-2218

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 1:06-CV-01251-JH/RHS)

(Filed May 30, 2008)

Daniel Israel (David Thuma and Robert H. Jacobvitz of Jacobvitz, Thuma, and Walker, Albuquerque, New Mexico, with him on the brief), Boulder, Colorado, for Plaintiffs-Appellants.

Eric R. Miller, Assistant Attorney General (Gary K. King, Attorney General, and David K. Thompson, Assistant Attorney General, with him on the brief), Santa Fe, New Mexico, for Defendants-Appellees.

Before **HENRY**, Chief Judge, and **BALDOCK** and **TYMKOVICH** Circuit Judges.

BALDOCK, Circuit Judge.

The issue presented in this appeal is one of first impression: Whether the Federal Mineral Leasing Act of 1920 (FMLA), 30 U.S.C. §§ 181-287, provides political subdivisions of a State an *implied* cause of action to challenge the State's allocation of federal mineral royalties received pursuant to the FMLA. The district court said no and dismissed the complaint. *See* Fed. R. Civ. P. 12(b)(6). Our review is de novo. *See Pace v. Swerdlow,* 519 F.3d 1067, 1073 (10th Cir. 2008). We exercise jurisdiction under 28 U.S.C. § 1291, and affirm.

I.

Section 191 of the FMLA, entitled "Disposition of moneys received," directs the Federal Government to return fifty percent of federal mineral royalties generated from the lease of public lands –

> to the State . . . within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any such State[] . . . to be used by such State and its subdivisions, as the legislature of the State

> may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public services. . . .

30 U.S.C. § 191(a). Section 195 of the FMLA, entitled "Enforcement," makes it unlawful for "any person" to participate in a plan to circumvent the FMLA's provisions. *Id.* § 195(a)(1). Subsection (c) specifically places responsibility for civil enforcement in the hands of the Attorney General:

> Whenever it shall appear that any person is engaged, or is about to engage, in any act which constitutes or will constitute a violation of subsection (a) of this section, the Attorney General may institute a civil action in the district court of the United States for the judicial district in which the defendant resides or in which the violation occurred or in which the lease or land involved is located, for a temporary restraining order, injunction, civil penalty of not more than $100,000 for each violation, or other appropriate remedy. . . .

Id. § 195(c); *see also id.* § 195(f) (placing concurrent civil enforcement power in the State where appropriate).

Meanwhile, New Mexico law provides that the larger portion of "money received by the State pursuant to the provisions of the [FMLA] shall be

distributed to the public school fund." N.M. Stat Ann. § 22-8-34.[1] Plaintiffs Cuba and Lea Soil and Water Conservation Districts contend that the State, in failing to provide them a share of the royalties received pursuant to the FMLA (the State provides them nothing), is violating § 191. Plaintiffs seek to enjoin the State Treasurer "from continuing to violate federal law until appropriate state legislation is enacted . . . in compliance with the direct mandate of [§ 191] which assures that subdivisions . . . impacted by federal mineral development receive priority in the

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[1] Section 22-8-34, entitled "Federal mineral leasing fund," provides:

> A. Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology, and except as provided in Subsection B of this section, all other money received by the state pursuant to the provisions of the federal Mineral Lands Leasing Act, 30 U.S.C. § 181, et seq., shall be distributed to the public school fund.
>
> B. All money received by the state as its share of a prepayment of royalties pursuant to 30 U.S.C. § 1726(b) shall be distributed as follows:
>
> (1) a portion of the receipts, estimated by the taxation and revenue department to be equal to the amount that the state would have received as its share of royalties in the same fiscal year if the prepayment had not been made, shall be distributed to the public school fund; and
>
> (2) the remainder shall be distributed to the common school permanent fund.

receipt of federal mineral royalties."[2] First Amend. Compl. ¶ 2.

II.

Because only Congress can create a cause of action to enforce federal law, our inquiry necessarily focuses on Congress' intent in enacting § 191 of the FMLA. *See Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004). Our task is to determine whether the FMLA displays an intent to create both a right and a remedy in favor of Plaintiffs. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). We begin by examining the statute for "'rights-creating language,'" which confers a right directly on an identified class that includes Plaintiffs. *Boswell*, 361 F.3d at 1267 (quoting *Sandoval*, 532 U.S. at 288). We also consider the relationship between the statute at issue and the statutory scheme in which it is encompassed. *See Boswell*, 361 F.3d at 1267.

The mere fact that an enactment is designed to provide a benefit to a particular group, what some may call a right, is not dispositive; we must also ask

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[2] In addition to their claim for prospective relief, Plaintiffs originally claimed a right to payment of past royalties. The Eleventh Amendment, however, clearly bars any claim for the retroactive payment of royalties the State has received pursuant to the FMLA. *See Edelman v. Jordan*, 415 U.S. 651, 663-671 (1974) (holding the Eleventh Amendment barred that portion of a district court order directing retroactive payment of aid benefits from the Illinois treasury).

whether the statutory scheme provides members of that group with a means to enforce it through litigation, what some may call a remedy. *See Universities Res. Assn. v. Coutu,* 450 U.S. 754, 771 (1981). Where Congress has expressly provided for enforcement of a statute by a particular means, we are hesitant to look beyond that means because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval,* 532 U.S. at 290.

Absent Congressional intent to create both a right and a remedy in favor of a plaintiff, a cause of action does not exist. *See id.* at 286. And we are not authorized to create a cause of action, "no matter how desirable that might be as a policy matter or how compatible with the statute." *Id.*; *see also Boswell,* 361 F.3d at 1269 (explaining that in determining whether Congress intended to create an implied cause of action, focusing on the broad remedial purpose of the statute, to the exclusion of its text and place in the legislative scheme, is unwarranted).

Accepting as true, as we must, the complaint's factual allegation that federal mineral development impacts Plaintiffs, we may assume without deciding that Plaintiffs fall within the group – political subdivisions of a State "socially or economically impacted" by federal mineral development – that § 191 is intended to benefit. The provision of the statute which provides the State may use monies received pursuant to the FMLA "as the legislature of the State may direct," cannot be viewed apart from the qualifier

"*giving priority* to those subdivisions of the State socially or economically impacted by development of minerals leased." 30 U.S.C. § 191 (emphasis added). But the question is not simply what group stands to benefit from the statute; the question is whether Congress intended to confer a cause of action upon that group's members. *See California v. Sierra Club*, 451 U.S. 287, 294 (1981).[3]

Without any clear indication that Congress intended to confer a cause of action upon Plaintiffs, we are loathe, based upon the imprecise standard of "giving priority," to tell the State how best to appropriate FMLA monies. *Cf. Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (explaining that "unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement" (internal brackets and quotations omitted)). The right which Plaintiffs assert and which § 191 purportedly protects is so indeterminate that any effort to enforce it by essentially telling the State legislature to "pass a statute" – Plaintiff's requested remedy – would strain judicial competence and represent an unwarranted intrusion upon State

[3] In previously holding that FMLA regulations did not create an implied right of action in favor of an aggrieved individual against mineral lessees for monetary and injunctive relief, we explained that "a mere proscription of behavior" does not alone warrant an inference that Congress intended to create an implied cause of action. *Pullman v. Chorney*, 712 F.2d 447, 449 (10th Cir. 1983).

sovereignty in tension with the Tenth Amendment. *Cf. New York v. United States*, 505 U.S. 144, 162 (1992) (holding Congress may not commandeer the state legislative process by requiring a state legislature to enact a particular kind of law). An array of legislative decisions might constitute "giving priority" to the legions of political subdivisions affected by federal mineral development. In other words, § 191 provides no manageable substantive standards for us to apply in determining what portion of the lease royalties properly belong to Plaintiffs. Congress must speak much more clearly if it intends for us to navigate the path Plaintiffs suggest we follow.

That Congress enacted a scheme, namely § 195, to remedy FMLA violations reinforces our conclusion that Congress did not intend to create the cause of action Plaintiffs' assert. *See Boswell*, 361 F.3d at 1269 (recognizing "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others" (internal quotations omitted)). "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mtg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). Accordingly, where Congress has created a "detailed" remedial scheme for the enforcement of a particular federal right, the Supreme Court has refused, in suits against government officers, to supplement that scheme under the exception to the Eleventh Amendment established in *Ex Parte Young*, 209 U.S. 123

(1908). *See Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996). Whether we view the issue from the perspective of the dubious existence of a cause of action in favor of Plaintiffs or the prohibition on suits against the State of New Mexico and its officials, the same principles apply here. Both inquiries turn upon congressional intent. *See id.* at 73-76 & n.17.

We need not decide the precise scope of § 195 to resolve this appeal. Suffice it to say "[w]e are simply not authorized to compare the remedies specifically provided by Congress with an . . . [implied] right of action and to then impose the latter remedy if we deem it a better means of enforcing the statute." *Boswell*, 361 F.3d at 1270. At this point, Plaintiffs' remedy lies in the political process rather than the judicial arena. Because nothing in the FMLA suggests Congress intended to create an implied cause of action under § 191 of the FMLA in favor of Plaintiffs, the judgment of the district court is –

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CUBA SOIL AND WATER CONSERVATION DISTRICT and LEA SOIL AND WATER CONSERVATION DISTRICT,

Plaintiffs,

vs.

Civ. No. 06-1251 JH/RHS

JAMES LEWIS, NEW MEXICO STATE TREASURER, and the STATE OF NEW MEXICO,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Aug. 28, 2007)

This matter came before the Court on Defendants' *Motion to Dismiss* [Doc. No. 5], in which they argue, *inter alia*, that Plaintiffs' Amended Complaint fails to set forth a justiciable "case or controversy" for adjudication, that Plaintiffs have no private cause of action for their claims, that Plaintiffs' claims present a political question upon which the Court may not encroach, and that Defendants have immunity under the Eleventh Amendment. For the reasons set forth below, the Court finds that Plaintiffs have no private

cause of action against the Defendants, and therefore will grant the motion to dismiss.[1]

BACKGROUND

Plaintiffs, two soil and water conservation districts, are subdivisions of the State of New Mexico ("the State"). Plaintiffs claim that both the State and its Treasurer, Defendant James Lewis, have failed to properly distribute federal mineral royalties that the State received under the Federal Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. §191(a), which provides in pertinent part:

> All money received from sales, bonuses, royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C.A. § 1701 et seq.], and rentals of the public lands under the provisions of this chapter and the Geothermal Steam Act of 1970 [30 U.S.C.A. § 1001 et seq.], shall be paid into the Treasury of the United States; and, subject to the provisions of subsection (b) of this section, 50 per centum thereof shall be paid by the Secretary of the Treasury to the State other than Alaska within the boundaries of which the leased lands or deposits are or were

[1] In reaching this decision, the Court has considered not only all the briefs on the motion to dismiss itself, but also the related arguments in Plaintiffs' reply brief in support of their motion for preliminary injunction [Doc. No. 18] and Plaintiffs' two surreplies [see Doc. Nos. 28 and 29].

> located; said moneys paid to any of such States on or after January 1, 1976, *to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter*, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service . . .

(emphasis added). Thus, fifty percent of all mineral royalties paid to the United States must be remitted to the State whose lands generated those royalties, with the directive that the State give priority to those subdivisions adversely affected by the mining activities for the purposes of planning, constructing, and providing public services.

In their Amended Complaint, Plaintiffs allege that the State of New Mexico does not distribute its share of federal mineral royalties in accordance with 30 U.S.C. § 191, but rather deposits the money in a general statewide education fund, without any requirement that priority be given to subdivisions most impacted by federal mineral development. Amended Complaint at ¶ 9. Plaintiffs allege that the communities and residents within the two districts are among the poorest in New Mexico, and that the past and present mineral development within their borders have caused adverse environmental, social and economic impacts. *Id.* at ¶¶ 6, 10-11. Plaintiffs seek monetary compensation – specifically, a portion of the past eight years of federal mineral royalty proceeds,

as well as a portion from the date of filing of their complaint forward, that is proportionate to the amount of such royalties generated from lands within their boundaries. Amended Complaint at ¶ 16.[2] Plaintiffs also seek an injunction against Lewis ordering him to deposit all federal mineral royalty funds into the Court registry until the New Mexico State Legislature enacts legislation regarding the distribution of such funds that the Court determines to be consistent with Section 191(a) of the MLA. *See id.* at ¶¶ 2, 16, 19 and "Prayer for Relief."

LEGAL STANDARDS

Defendants move to dismiss this case on grounds of lack of subject matter jurisdiction, Rule 12(b)(1), and for failure to state a claim, Rule 12(b)(6). In ruling on the motion, "all well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to the non-moving party." *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006) (internal quotation marks omitted).

DISCUSSION

The Court turns first to the State's argument that the MLA does not provide the Plaintiffs with a

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[2] However, it appears that Plaintiffs now concede that their claim for eight years of past relief is barred by the Eleventh Amendment. *See* Doc. No. 8 at p. 21, n.16 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1973)).

private right of action under which to pursue their claims. While acknowledging that the MLA does not explicitly create a cause of action on their behalf, Plaintiffs argue that the statute creates an implied cause of action. To establish a private right of action, Plaintiffs must show that the MLA manifests Congressional intent to create a private right and also a private remedy. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Congressional intent is the only basis upon which a private right of action may be inferred, *See Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 857 (10th Cir. 2003) (citing *Alexander v. Sandoval*, 532 U.S. at 286 (2001)); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004). "Without it, a cause of action does not exist and courts may not create one no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. at 286-87 (2001).

To determine Congressional intent, the Court must first examine the statute for "rights-creating language." *Id.* at 288 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690, n.13 (1979)). Such language "explicitly confers a right directly on a class of persons that includes the plaintiff" and identifies "the class for whose especial benefit the statute was enacted." *Boswell*, 361 F.3d 1263, 1267 (10th Cir. 2004) (quoting *Cannon*, 441 U.S. at 690 n.13, 688 n.9 (1979) (internal quotation marks omitted)). As was the case in *Alexander v. Sandoval*, the statute at issue here is devoid of such "rights-creating language." Neither 30 U.S.C. § 191 specifically, nor the MLA

generally, appears to create particular rights in the subdivisions of a State or their residents. Instead, Section 191 says that the monies paid to the State is to be used "as the legislature of the State may direct" with Congress directing those States to give priority to those subdivisions socially or economically impacted by mineral development. The statute is silent as to how a State should evaluate the relative social and economic impact on its subdivisions. The Supreme Court has found that statutes that merely regulate the distribution of public funds by a federal agency do not create private rights of action for the benefit of the recipients of such funds. *See, e.g., Cannon v. University of Chicago*, 441 U.S. at 690-693 (expressing reluctance to infer a private remedy in favor of individual persons if Congress, instead of drafting a statute with an unmistakable focus on the benefitted class, had written it simply as a prohibition against the disbursement of public funds to institutions engaged in discriminatory conduct); *Universities Research Ass'n. Inc. v. Coutu*, 450 U.S. 754, 772-73 (1981) (declining to find a private remedy in Section 1 of the Davis-Bacon Act, because while it requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, it does not confer rights directly on those individuals since it is "phrased as a directive to federal agencies engaged in the disbursement of public, funds"). Plaintiffs emphasize the fact that Congress amended the MLA in 1976 such that the distribution of funds no longer focused upon statewide schools and roads, but rather upon giving

priority to geographic subdivisions of a state most affected by mineral development. They also cite to legislative history in which members of Congress embraced that approach. However, that same legislative history cited by Plaintiffs does not demonstrate that Congress intended to also endow State subdivisions with a private right of action. The revisions to the statutory language do not remove the discretion afforded to State legislatures in implementing Congress' directive. Thus, the amendments to the statute regarding the purposes of the funds to be distributed simply do not create a private right of action in any person or entity who disagrees with the State's approach in spending the money. In short, there is nothing in the text or structure of the MLA in general, or in Section 191 specifically, that indicates that Plaintiffs are members of the class for whose special benefit the statute was enacted. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). The statute does not define such a class of state subdivisions with any precision, instead leaving that decision to the legislatures of the states receiving funds under Section 191.

The Court also must consider "the relation between the specific provision at issue and the related statutory scheme," *Boswell*, 61 F.3d at 1267 (citing *Love v. Delta Airlines*, 310 F.3d 1347, 1353 (11th Cir. 2002)). In other words, the Court must examine the text and structure of the statute. *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 91 (1981)). In this way, the Court may determine whether there is any indication of Congressional

intent to create or deny a private legal remedy. Again, the Court concludes that Congress did not intend to create a private right of action against the states. Section 195 of the MLA, 30 U.S.C. § 195, discusses enforcement of the statute. It provides that it is unlawful to organize or participate in a scheme to defeat the purposes of the statute or to obtain money under the Act through false statements. *Id.* at § 195(a). The MLA provides for the imposition of a fine or term of imprisonment, *id.* at § 195(b) and (e), and specifically states that the United States Attorney General and the States themselves may institute civil actions to enforce the statute. *Id.* at § 195(c) and (f). Conspicuously absent is any mention of a civil action by a state subdivision or any other citizen against a State in order to enforce the "priority" distribution of mineral royalties under Section 191.

Next, the Plaintiffs must show that implying a private remedy is consistent with the underlying purposes of the MLA. *Coutu*, 450 U.S. at 771 (observing that the fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicate's that Congress intended that it be enforced through private litigation). Courts have observed that the statute's purpose is to promote the orderly development of oil and gas deposits in publicly owned lands through private enterprise, and by doing so obtain reasonable returns on assets belonging to the public. *See Harvey v. Udall*, 384 F.2d 883,

885 (10th Cir. 1967); *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383, 392 (D. Wy. 1983). A private right of action in favor of the Plaintiffs would not assist these purposes, but rather would encourage an increase in litigation by individuals and state subdivisions against States over their prioritization of the relative impacts upon and needs of state subdivisions. Nothing in the text of the statute supports such an outcome.

Plaintiffs rely upon the district court's decision in *Arkla Exploration Co. v. Watt*, 548 F. Supp. 466 (D. Ar. 1982) in support of his contention that the MLA creates a private cause of action in their favor. However, *Arkla* is distinguishable. In that case, a natural resources exploration company sued the United States Department of the Interior, challenging its decision to grant oil and gas leases to a competitor. The court found that it had jurisdiction to review a final action by that federal agency under the Administrative Procedures Act or 28 U.S.C. § 1331. *Id.* at 472. The court also concluded that under the criteria set forth in *Cort v. Ash*, 422 U.S. 66 (1975), Section 191 of the MLA creates a right of action, in favor of a State to enforce its right to fifty percent of the mineral royalties, including the right to attack allegedly capricious determinations by a federal agency which affect those payments. However, this case involves an action against a State, not review of an administrative decision by a federal agency. The court in *Arkla* neither considered nor held that the MLA creates a private right of action for individuals or state

subdivisions to sue a State to enforce any portion of the Act. Therefore, *Arkla* is not helpful to Plaintiffs' argument.

In light of all the foregoing, the Court concludes that the MLA does not create an implied private cause of action in favor of the Plaintiffs. Therefore, the Court need not reach the Defendants' remaining arguments, which are now moot. *See, e.g., National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 456, 465 n. 13 (1974) (observing that if a private cause of action does not exist in favor of a particular, plaintiff, the issues of standing and jurisdiction need not even be addressed).

IT IS THEREFORE ORDERED that Defendants' *Motion to Dismiss* [Doc. No. 5] is **GRANTED**, and *Plaintiffs' Motion for a Preliminary Injuction* [sic] [Doc. No. 12] is **DENIED AS MOOT**.

/s/ _____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CUBA SOIL AND WATER CONSERVATION DISTRICT; LEA SOIL AND WATER CONSERVATION DISTRICT, Plaintiffs-Appellants, v. JAMES LEWIS, New Mexico State Treasurer, STATE OF NEW MEXICO, Defendants-Appellees.	No. 07-2218

ORDER

(Filed Jul. 15, 2008)

Before **HENRY**, Chief Judge, and **BALDOCK**, and **TYMKOVICH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

Excerpt from New Mexico Brief Before the 10th Circuit Court of Appeals

* * *

private right or remedy. Not only did Congress not provide any private right or remedy when it expanded the scope of uses for § 191 funds but most importantly recognized the possibility of disputes between subdivisions and States concerning such funds and the lack of any related enforcement rights for subdivisions or citizens yet to this day has not provided for any private right of action or remedy.

CONCLUSION

The District Court's decision that § 191 does not provide any subdivision, including the Districts, or citizen any private right of action or remedy should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully requests an oral argument.

CERTIFICATE OF COMPLIANCE

In compliance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I do hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B)(ii). The brief contains 6,069 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii) from said limitations. This

brief is prepared in Microsoft Word 2003, Times New Roman 14-point font.

Respectfully submitted,

GARY K. KING
Attorney General of the State of New Mexico

Supreme Court of the United States.
LAWRENCE COUNTY, et al., Appellants,
v.
LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1.
No. 83-240.
October Term, 1983.
February 8, 1984.

On Appeal from the Supreme Court
of the State of South Dakota

Brief for the United States as Amicus Curiae

* * *

. . . Here the federal statute, the Payments in Lieu of Taxes Act, is properly read as conferring discretion on local governments to allocate the payments they receive under the Act. S.D. Codified Laws § 5-11-6, which requires local governments to apportion those payments in a particular manner, therefore conflicts directly with the mandate of the federal statute and interferes with the accomplishment of Congress's goals. The state statute is invalid under the Supremacy Clause to the extent it mandates allocation of the federal payments.

If permitted to stand, the decision of the South Dakota Supreme Court will frustrate one of the congressional objectives underlying the Payments in Lieu of Taxes Act. In addition, the decision may encourage other states to follow South Dakota's example, leading to further interference with operation of the federal program. Therefore, we join appellants in urging the Court to note probable jurisdiction and to

reverse the judgment of the South Dakota Supreme Court.

1984 WL 565950 pp 6-7

* * *

No. 08-499

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

CUBA SOIL AND WATER CONSERVATION DISTRICT and LEA SOIL AND WATER CONSERVATION DISTRICT,

Petitioners,

v.

JAMES LEWIS, TREASURER, STATE OF NEW MEXICO and STATE OF NEW MEXICO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 30 U.S.C. § 191 of the Federal Mineral Leasing Act imply a private cause of action and remedy to political subdivisions, such as Petitioners, who dispute the amount of funding they or other state agencies or political subdivisions are receiving as directed by the state legislature?

LIST OF PARTIES

The Cuba Soil and Water Conservation District and the Lea Soil and Water Conservation District are political subdivisions of the State of New Mexico.

Respondent James Lewis is the Treasurer for the State of New Mexico and receives royalty payment funds pursuant to 30 U.S.C. § 191 and Respondent State of New Mexico is a sovereign state of the United States.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
A. The 1978 Mineral Leasing Act, 30 U.S.C. § 191, Provides Funds To Be Used By Each Included State And Its Subdivisions As The State Legislature Directs	8
B. The "Priority" Provision Of 30 U.S.C. § 191 Describes Some Alternative Uses For The MLA Funds Received By The State And New Mexico Has Complied	9
C. The MLA Provides Neither An Express Or Implied Private Right Of Action Nor A Private Remedy	11
D. Congress Did Not Include Any "Rights Creating Language" For The Petitioners In The MLA	14

TABLE OF CONTENTS – Continued

Page

E. The Relation Between § 191 And The MLA Statutory Scheme Demonstrates No Intent To Create A Private Right Of Action Nor A Remedy 15

F. The MLA Legislative History Does Not Establish An Intent By Congress To Imply A Private Right Of Action But Rather Excludes It 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Alexander v. Sandoval, 532 U.S. 275 (2001) .....*passim*

Allen v. State Board of Elections, 393 U.S. 544 (1969).....15

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).....6, 14, 15

Lawrence County v. Deadwood School District, 469 U.S. 256 (1984).....12

Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).....15

Texas & Pacific R. Co. v. Rigsby, 241 U.S. 33 (1916).....15

Universities Research Ass'n, Inc. v Coutu, 450 U.S. 754 (1981).....6, 7, 14

FEDERAL STATUTES:

30 U.S.C. § 191 .....*passim*

30 U.S.C. § 195 .....7, 16, 17

Payment in Lieu of Taxes Act, 31 U.S.C. § 6902.....12

NEW MEXICO STATUTES:

NMSA § 22-8-14B 4

NMSA § 22-8-18 *et seq.* 4

NMSA § 22-8-18B 4

TABLE OF AUTHORITIES – Continued

Page

NMSA § 22-8-23 4

NMSA § 22-8-26 4

NMSA § 22-8-27B 4

NMSA § 22-8-30 4

NMSA § 22-8-34 10

NMSA § 22-8-34(A) 2

NMSA § 22-15-2C 3

NMSA § 22-15-7 3

NMSA § 22-15-8B and C 3

NMSA § 69-1-2 4

OTHER JURISDICTIONS:

Nye County, Nevada v. Krolicki, No. CV-N-99-388 (D. Nev. March 29, 2000) 17

OPINIONS BELOW

Respondents join in the Petitioners' statement of the citations of the opinions below.

JURISDICTION

Respondents join in the Petitioners' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents join in the Petitioners' statement of the constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

The Petitioners filed their action against the Respondents in the United States District Court for the District of New Mexico seeking declaratory relief and an injunction against the distribution of funds by the Respondents that had been provided pursuant to 30 U.S.C. § 191 ("§ 191"), of the Federal Mineral Leasing Act ("MLA") until the New Mexico legislature enacted legislation, which in the judgment of the Court, satisfied the "priority" provision of § 191. First Amended Complaint, Petitioners' Appendix filed with

the United States Court of Appeals for the Tenth Circuit. ("Aplt. App."), p. 16.

The relevant portion of § 191 provides that fifty percent of the sales, bonuses and royalties collected by the federal government from oil, gas and mineral developers for production in a given State shall be paid to that State:

> . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service.

The Petitioners claim that the uses for the funds under this provision include:

> libraries and recreation centers . . . secondary, community and university level education resources. . . . In addition, . . . training necessary to expand their poor rural economies. First Amended Complaint, Aplt. App. p. 13.

Pursuant to the MLA the New Mexico state legislature has directed the uses for these monies be accomplished in a variety of ways many of which are consistent with the uses described in § 191 and as alleged by the Petitioners. During the relevant time period New Mexico has enacted NMSA § 22-8-34(A), as amended 2001, that provides:

> Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources of the New Mexico institute of mining and technology, and except as provided in Subsection B of this section, all other money received by the state pursuant to the provisions of the Federal Mineral Leasing Act, 30 USCA 181, et seq., shall be distributed to the public school fund.[1]

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[1] The first appropriation is to the instructional material fund whose uses include textbooks and other educational media that are used as the basis for instruction, NMSA § 22-15-2C; those eligible for the free use of these materials include all students in public schools, state institutions and private schools approved by the state board in all grades from first through twelve and any student in an adult basic education program approved by the Commission on Higher Education, NMSA § 22-15-7 and each of the above educational institutions may select the appropriate instructional materials for its students from a multiple list provided by the Department of Education and has the discretion to spend up to fifty percent of their allocations for instructional materials not on the multiple list, NMSA § 22-15-8B and C.

The next appropriation is to the Bureau of Geology and Mineral Resources of the New Mexico Institute of Mining and Technology whose purposes include collect, compile and publish information relative to New Mexico mining; map and study the geological formations of the state with special reference to their economic mineral resources; study the mining carried on in the state with special reference to their improvement; prepare and publish bulletins and reports of the natural resources and geology, mines and mineral deposits; assist in the education of miners, industries and the general public; consider such other scientific and economic problems and questions that are deemed of value to the people of New Mexico and coordinate with the

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Petitioners erroneously rely here on the affidavits submitted to the trial court in support of their motion for a preliminary injunction. Not only are they irrelevant to the issue of whether there is a private

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Mining and Minerals Division and the Secretary of Energy, Minerals and Natural Resources in the formulation of overall policy in the area of mining and minerals, NMSA § 69-1-2.

The remainder of the funds is to be distributed to the public school fund. This fund is distributed to public schools and state-charter schools in three parts: state equalization guarantee distribution, transportation distribution and supplemental distributions, NMSA § 22-8-14B. The equalization distribution is "program cost" that includes the following uses: early childhood education, basic education, special education, bilingual multicultural education, size adjustment and at-risk program. NMSA § 22-8-18 *et seq.* An example of a specific use in the size adjustment is for schools with less than 400 students. NMSA § 22-8-23.

The transportation distribution enables school districts to purchase school buses that include the express uses for developmentally disabled three and four year old children and for students where vocational education programs are offered, NMSA § 22-8-26, and also enables schools to purchase additional buses for special needs, NMSA § 22-8-27B.

The supplemental distribution includes emergency distributions to school districts in financial need for program enrichment that cannot be otherwise financed that includes uses such as special vocational education at area vocational schools and for emergency capital outlays demanding immediate attention, NMSA § 22-8-30.

Finally, the public school fund statute provides that it is the responsibility of the local school board to determine priorities in terms of the needs of the community it serves. The funds available under this fund are discretionary as to each school district provided that the enumerated special programs in the section are met. NMSA § 22-8-18B.

cause of action or remedy under the MLA but also the trial court in rendering its decision did not rely upon them.[2]

SUMMARY OF ARGUMENT

The lower courts held that the Petitioners have neither an implied private cause of action nor a remedy for any of their claims under the MLA. The fundamental premise of these claims is that the Petitioners disagree with the appropriations made by the New Mexico legislature of the funds received under the MLA and they should receive more of these funds and other state agencies and political subdivisions should receive less.

While Petitioners have gone to considerable lengths to convince the Courts below, and again here, of the merits of their claims, they have failed to satisfy the substantial controlling precedent that there is no private cause of action nor a remedy for such claims under the MLA. Petitioners overly rely on the Court of Appeals' statement that the issue of

[2] United States District Court for the District of New Mexico, Memorandum Opinion and Order, August 28, 2007, footnote 1 noted that only the reply brief of Petitioners relating to the preliminary injunction and the two surreplies were utilized. Appendix p. 11. The affidavits relied upon here were attached only to the Petitioners' Memorandum in Support of the Motion for Preliminary Injunction and, therefore, were not considered by the trial court. Aplt. App. pp. 160-175.

whether there is a private cause of action or remedy under the MLA is "one of first impression." It is clear the controlling precedent and principles determinative of this issue and relied upon by the Courts below are not of first impression.

The Petitioners have the burden of showing the MLA expresses Congressional intent to create a private right of action and a private remedy. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The sole basis upon which a private right of action can be inferred is Congressional intent. *Id.* The Courts below relied upon *Alexander* for the principle that without such intent, a cause of action does not exist and courts will not create one. *Id.* at 286-287.

Cannon v. Univ. of Chicago, 441 U.S. 677, 690, n. 13 (1979) held that to determine Congressional intent the statute must be examined for "rights-creating language" and there must be an explicit conferring of a right directly on a class of persons that includes the plaintiff and identifies the class for whose special benefit the statute was enacted. The MLA is silent in terms of any rights-creating language for political subdivisions.

Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 772-773 (1981) held there was no private remedy in Section 1 of the Davis-Bacon Act where it was required that provisions be placed in federal construction contracts for the benefit of laborers. This did not create private rights for these individuals because it was only phrased as a "directive to federal

agencies engaged in the disbursement of public funds." *Id.* at 772-773. The same is true here as the "priority" of § 191 is at best only a directive to each state legislature as a part of its discretionary directing of the uses for the MLA monies.

The Court has determined that there must be an analysis of "the relation between the specific provision at issue and the related statutory scheme" as a part of determining whether a private right of action exists which has been interpreted to mean an examination of the text and structure of the statute. *Alexander* at 288. The MLA's enforcement provision is found in 30 U.S.C. § 195. It only provides for enforcement by the United States Attorney General and the States through civil actions. There is no provision for enforcement by government subdivisions.

While the Petitioners have relied upon some legislative history for the merits of their claims, the legislative history relevant to whether there is a cause of action or a remedy for such claims establishes there is none. This history demonstrates that Congress was aware of possible tension between States and their subdivisions regarding the apportionment of MLA funds and that it was also aware of the lack of any enforcement scheme for such disputes. Yet Congress to this date has not provided political subdivisions, such as the Petitioners, with any form of enforcement rights of action or remedies under the MLA.

The sanctioned ability of thousands of subdivisions in all of the MLA recipient States to institute court claims for legal remedies based on disagreement with the distribution of MLA funds by state legislatures was never intended by Congress.

ARGUMENT

A. The 1976 Mineral Leasing Act, 30 USC § 191, Provides Funds To Be Used By Each Included State And Its Subdivisions As The State Legislature Directs

The specific provision of the MLA in dispute is § 191. It provides in relevant part that fifty (50) percent of the sales, bonuses and royalties collected by the federal government from oil, gas and mineral developers for production in a given State shall be paid to that State:

> . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service.

In analyzing this text it is clear that as a part of the States receiving the MLA funds from mineral development in each involved state Congress intended that the state legislature had the discretion

and final authority to determine the uses for these funds. In addition, the MLA is silent as to how each State legislature decides which state agencies and/or subdivisions are to implement the uses of the MLA funds as directed by the legislature.[3]

B. The "Priority" Provision Of 30 USC § 191 Describes Some Alternative Uses For The MLA Funds Received By The State And New Mexico Has Complied

30 USC § 191 provides that as a part of each State legislature directing the uses and methods of implementation it is to give "priority" to "subdivisions that are socially or economically impacted by the development of minerals" pursuant to the MLA. Congress left to each State legislature to determine the nature and extent of "socially or economically impacted." There is a broad range of services and materials that can address social and economic impacts. Again, Congress left it up to each State

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[3] Each state legislature has the unique knowledge regarding the experience, capability and structure of its political subdivisions to decide which of them can most effectively utilize the MLA funds including "priority" subdivisions in terms of the § 191 uses that include planning, public facilities and public service. For example, a state legislature may know that an impacted area under § 191 needs additional education, vocational and health facilities and services. The legislative decision may be a variety of existing educational, vocational and health institutions are more educated, experienced and better staffed than other subdivisions, such as Petitioners, to accomplish these purposes and make the best use of the MLA funds.

legislature to interpret both the meanings and methods to address these matters.

The New Mexico state legislature has complied with the provisions of § 191.[4] The New Mexico legislative framework for identifying the uses of the MLA funds together with the methods of implementation is found in NMSA § 22-8-34. In summary, the New Mexico legislature has directed that appropriations of the MLA funds be made to the instructional material fund, the New Mexico Institute of Mining and Technology and to the public school fund. In turn there are specific statutes governing the uses of these three major appropriations (See pp. 2-3 and footnote 1 above and Aplt. App. pp. 30-35).

Many of these dedicated uses include the three uses described in § 191, planning, construction and maintenance of public facilities and provision of public service. These dedicated uses are also the same as the uses identified by the Petitioners including libraries and recreation centers, secondary, community and university level education resources and training necessary to expand their poor rural economies.

---

[4] Petitioners have claimed in several places in their Petition that New Mexico admits the funds are not being used for § 191 purposes. While not determinative of the private cause of action or remedy issue, the Respondents have consistently informed the Courts below that many of the purposes of § 191 and as alleged by Petitioners have been served.

Therefore, on the face of the New Mexico legislative scheme both the priority and the uses of § 191 have been fulfilled.

C. The MLA Provides Neither An Express Or Implied Private Right Of Action Nor A Private Remedy

Should it be assumed that the New Mexico legislature has not complied with § 191, the Petitioners' claims fail because they have no private right of action or remedy under the MLA. The Petitioners' real remedy lies with the New Mexico legislature in seeking a change to the legislative scheme of directing the appropriations of the MLA funds.

The Petitioners acknowledge they do not have an express right of a private action or a remedy but assert they have an implied right of action and remedy. The starting point under recent judicial precedent for determining if such an implied right exists is the decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Court provided several fundamental standards to be applied including:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. (Citations omitted).
>
> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. (Citations omitted). Statutory intent on this latter point

> is determinative. (Citations omitted). Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. (Citations omitted).
>
> Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals. *Id.* at 286-287.

Petitioners have consistently focused on the merits of their claims in the apparent hope that a court will ignore the Court's admonition not to create a cause of action nor a remedy no matter how desirable that may be as a matter of policy or how compatible with the MLA.[5]

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[5] Petitioners rely on *Lawrence County v. Deadwood School District*, 469 U.S. 256 (1984) to support the granting of their Petition. Petition, pp. 6-8. *Lawrence County* did not involve any consideration of whether a private cause of action existed under the federal statute involved. Petitioners rely only upon the merits of the Supremacy Clause determination. While not relevant to the issue here, that determination is readily distinguished. The Payment in Lieu of Taxes Act, 31 U.S.C. § 6902 ("Act"), provided in relevant part the Secretary of the Interior make annual payments "to each unit of general local government in which entitlement land is located." (Such units were defined elsewhere in the Act to include counties, townships and cities.) The Act also provided that "A unit may use the payment for any governmental purpose." The Act, unlike § 191, provided a direct payment to political subdivisions to use in their discretion that the Court found could not be abridged under the Supremacy Clause by South Dakota's statute that limited such

(Continued on following page)

Alexander held the method to determine Congressional intent was to examine the statute for "rights-creating" language which "explicitly confers a right directly on a class of persons that includes the plaintiff (internal quotation marks omitted) (citations omitted) and language identifying the class for whose especial benefit the statute was created." (Internal quotation marks omitted) (citations omitted). "We also consider the relation between the specific provision at issue and the related statutory scheme." *Id.* 532 U.S. 275, 288.[6]

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discretion to a formula based on the distribution of general tax revenues.

[6] Petitioners miss the point of the Court of Appeals' analysis that includes the Tenth Amendment. Petition pp. 10-25. The Court below noted that under either private cause of action or Eleventh Amendment analysis "[B]oth inquiries turn upon congressional intent." (citation omitted) Appendix p. 9. This was in the context of concern about interpreting and enforcing the "imprecise standard" of "giving priority" under § 191. *Id.* at 7. The Court below noted that an "array of legislative decisions might constitute 'giving priority' . . . " *Id.* at 8. The Court of Appeals under this circumstance expressed reluctance to intrude upon State sovereignty under the Tenth Amendment. *Id.* at 7-8. Finally, noting that Congress cannot require a state legislature to enact a particular kind of law. *Id.* at 8. Simply put, the Court below as a part of finding no private cause of action under § 191, held that Congress cannot force state legislatures to enact legislation when it has not clearly defined essential terms (here "giving priority") and the judiciary cannot reasonably provide or enforce relief under such circumstances.

D. Congress Did Not Include Any "Rights Creating Language" For The Petitioners In The MLA

The MLA fails to identify any "rights-creating language" as to the Petitioners nor are they one of the class for whose special benefit, that implies a right, for whom the statute was created.

In resolving the special benefit issue in the context of the distribution of public funds *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981) declined to find a private right of action under the Davis-Bacon Act that required certain stipulations be included in federal construction contracts for the benefit of mechanics and laborers. In relying on *Cannon* the Court held the benefiting language was only "phrased as a directive to federal agencies engaged in the disbursement of public funds." 450 U.S., 772. The language of § 191 authorizes each State legislature to direct the use of the MLA funds for the benefit of each state and at most is a directive that includes a priority for certain subdivisions among all of the State's subdivisions. No right has been created.

The Petitioners attempt to create a right of action through reference to a statement in *Cannon* that the Supreme Court has "never withheld a private remedy where the statute explicitly confers a benefit on a class of persons . . . " Petition, pp. 30-31. Petitioners erroneously assume such a benefit and their own class when in fact the priority relied upon is at best a directive for the distribution of public

funds that does not create a special benefit or a class for them and, therefore, does not imply a private right of action.

Cannon describes the various rights-creating statutes that contained a right for a class in which a claimant was a member. *Id.* 441 U.S. 677, 689-693 and nn. 10, 12 and 13. These included the federal statute covering any employee of a railroad and the requirement of hand holds, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916); the language of the Voting Rights Act of 1965 that "no person shall be denied the right to vote" for failure to comply with certain state statutory provisions, *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and "employees shall have the right to organize and bargain collectively through representatives . . . " *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). These provisions are in clear contrast to § 191 that contains no express granting of rights nor prohibitions of denying any rights to the Petitioners.

E. The Relation Between § 191 And The MLA Statutory Scheme Demonstrates No Intent To Create A Private Right Of Action Nor A Remedy

The second factor in *Alexander* for determining whether a private right of action was implied is the relation between the specific provision at issue and the related statutory scheme. *Id.* 532 U.S. 275, 288.

The MLA's enforcement provisions are found in 30 U.S.C. § 195 and do not include any right to a private right of action nor a remedy by any state subdivision or citizen. The only parties with the right of civil enforcement action under the MLA are the United States Attorney General and the States. *Id.* at § 195(c) and (d). First, it is apparent that Congress explicitly only provided a right of enforcement action under the MLA to the United States Attorney General and to the States.

Second, by doing so, Congress intended that no other parties had any right of action or remedy. The Court of Appeals below relied on *Alexander* for the principle:

> The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. Appendix p. 6.

Petitioners acknowledge the 1987 amendment to the MLA "on its face" did not provide them with any ability to bring an enforcement action. Petition, pp. 31-32. However, again Petitioners assert without merit the "directive" in § 191 implies a right of action. Petition pp. 31-34.

As demonstrated below the legislative history establishes that Congress was aware of both the possible conflict between subdivisions and States regarding the funds under § 191 and the lack of any enforcement provisions for the subdivisions yet has decided over a thirty-year period to provide no right

of private action or remedy for such subdivisions either by statute or administrative regulation but rather only to the U.S. Attorney General and the States.

No private right of action for a subdivision was found under § 191 in *Nye County, Nevada v. Krolicki*, No. CV-N-99-388 (D. Nev. March 29, 2000) (Supplemental Appendix, United States Court of Appeals for the Tenth Circuit ("Supp. App.") pp. 200-210). The identical claims in the present action were presented in that case. (The Respondents believe this is the only other decision resolving whether there is a private cause of action or remedy under § 191).

The Court in *Nye County* determined from the pleadings that forty percent of the mineral royalties paid to the United States under § 191 were generated in Nye County but less than two percent of the funds distributed by the Nevada legislature went to Nye County. The Court also found that all of the MLA funds received by the State of Nevada under § 191 were deposited in the state distributive school account in the state's general fund and distributed on a per pupil basis.

The *Nye County* Court reviewed the MLA enforcement provisions in § 195 noting that only the U.S. Attorney General and the States had such powers and concluded: "However, the statute is silent as to private causes of action against a state." (Supp. App., p. 205).

F. The MLA Legislative History Does Not Establish An Intent By Congress To Imply A Private Right Of Action But Rather Excludes It

The legislative history of the MLA relied upon by the Petitioners and § 191 in particular, the essence of which is over a now more than thirty-year period, Congress intended to expand the uses of the MLA funds beyond roads and schools but not exclude those uses and provide at most a directive to each involved State legislature as to a priority for the possible uses of some of these funds. It recognized the possibility of tensions and disputes between the States and subdivisions regarding the uses for the MLA funds but left the decision as to the uses and appropriations of the funds together with the methods of implementation to the direction of each State legislature. However, Congress did not amend the MLA or its administrative procedures to provide for any private right action or remedy for subdivisions under § 191 even though there was a recognition of the lack of any such right of enforcement.[7]

Petitioners assert legislative history provides the necessary basis to conclude that Congress intended to imply that the subdivisions have a private right of action and remedy under § 191. To the contrary, this history establishes the clear lack of any intent by

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[7] Aplt. App. pp. 101-102, 104-106 (Arnold E. Petty, Deputy Director for Services, Bureau of Land Management); Petition, pp. 18-19.

Congress to imply any such private right or remedy. Not only did Congress not provide any private right or remedy when it expanded the scope of uses for § 191 funds but most importantly was aware of the possibility of disputes between subdivisions and States concerning such funds and the lack of any related enforcement rights for subdivisions, yet to this day has not provided any private right of action or remedy for them.

CONCLUSION

For all the foregoing reasons discussed herein, the Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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